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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1928

No. 524

MARYLAND CASUALTY COMPANY
(a corporation),
Petitioner,

vs.

MILLIE R. JONES,
Respondent.

BRIEF FOR RESPONDENT.

I.

THE OPINIONS OF THE COURTS BELOW.

The District Court filed no opinion in the case. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit is reported in 27 Federal Reporter, 2d Series, page 521. (R. pp. 354-355.)

II.

STATEMENT OF THE CASE.

The case is fully presented in the petition for a writ of certiorari on file herein and in the briefs of both petitioner and respondent filed with the Circuit Court. These briefs appear in the appendix hereof as Exhibits "A" and "B," and a restatement in full at this point would serve no useful purpose. The trial occurred before the District Court for the Northern District of California, sitting without a jury in pursuance of written stipulation of the parties litigant. (R. p. 48.) Special findings were made (R. pp. 54-72) to which no exception was reserved on behalf of petitioner. Petitioner made no request for other or different findings. Judgment was finally made and entered in favor of respondent. (R. pp. 72-73.)

A writ of error to the Circuit Court of Appeals for the Ninth Circuit resulted in an affirmance of the judgment theretofore rendered by the District Court, 27 Fed. (2nd) 521. (R. pp. 354-357.) The Circuit Court, in its decision, took the position that under Section 700 of the Revised Statutes (28 U. S. C. A. Sec. 875), its review was limited to the question of whether or not the facts found supported the judgment and could not include the sufficiency of the evidence to support the findings. In the light of petitioner's concession that the findings supported the judgment, the case was affirmed. The basis of the Circuit Court's decision was not suggested by respondent, either in the oral argument or in her brief, but

on the contrary, respondent attempted to effectively dispose of the case on its merits alone.

III.

ARGUMENT.

A.

PRELIMINARY STATEMENT.

The review of this cause by this Honorable Court is limited by the express terms of the order granting petitioner's petition for a writ of certiorari, to the sole question of whether or not the Circuit Court of Appeals erred in failing to review the rulings of the District Court in the progress of the trial, excepted to at the time and duly presented by bill of exceptions. Respondent's argument will therefore be confined in accordance with the provisions of that order.

B.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN FAILING TO REVIEW THE RULINGS OF THE DISTRICT COURT IN THE PROGRESS OF THE TRIAL EXCEPTED TO AT THE TIME AND DULY PRESENTED BY BILL OF EXCEPTIONS BECAUSE OF APPELLANT'S FAILURE TO SPECIFY IN ITS BRIEF THE ALLEGED ERRORS RELIED UPON, AND FURTHER FAILURE TO SET OUT SEPARATELY AND PARTICULALY EACH ERROR ASSERTED AND INTENDED TO BE URGED.

By virtue of Section 122 of the Judicial Code (28 U. S. C. A. 219) there is vested in each Circuit Court

of Appeals, power to establish all rules and regulations for the conduct of the business of the Court within its jurisdiction as conferred by law. In pursuance of that section the United States Circuit Court of Appeals for the Ninth Circuit adopted and there was in force during the pendency of this case in that Court certain rules, among which is contained the following:

"RULE 24.

BRIEFS. 1. The counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief, and serve upon counsel for the appellee one copy thereof, at least 30 days before the case is called for argument.

2. This brief shall contain, in order here stated:

(a) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(b) *A specification of the errors relied upon, in actions at law, shall set out separately and particularly each error asserted and intended to be urged;* and in equity cases the specifications shall state, as particularly as may be, in what the decree is alleged to be erroneous. ***When the error alleged is to the admission or to the rejection of evidence, the specifications shall quote the full substance of the evidence admitted or rejected.*** When the error alleged is to the charge of the court, the specifications shall set out the part referred to totidem verbis, whether it be in instructions given or instructions refused. *When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.*" (Italics ours.)

The brief filed on behalf of petitioner in the Circuit Court, a certified copy of which appears in the appendix hereof as "Exhibit A," contains the following specifications of error *and no others* (Appendix "Exhibit A," pp. 5-6):

> "The defendant makes the following specifications of error in support of its petition and writ issued thereon:
>
> 1. The Court erred in finding that plaintiff is entitled to recover upon the bond as an employer therein mentioned;
>
> 2. The Court erred in finding that plaintiff complied with the terms of the bond and the application upon which it was given;
>
> 3. The Court erred in finding that the employer's statement was fulfilled by plaintiff according to its terms;
>
> 4. The Court erred in finding that defendant ever had any knowledge of the original agreement between plaintiff and Akers until more than one year after this agreement was made;
>
> 5. The Court erred in finding that the words contained in the bond 'as their interests may appear' had any application to plaintiff after the incorporation of the 'Reservation Land and Cattle Company;'
>
> 6. The Court erred in finding that notice of misapplication of funds by Akers was given to defendant by plaintiff according to the terms of the bond;
>
> 7. The Court erred in rendering judgment against defendant for the reason that the evidence affirmatively shows that Akers was permitted by plaintiff to perform the terms of the lease agreement after Akers had made a breach of said agreement upon his part and with the full knowledge of plaintiff and without any knowledge of the defendant.

8. The evidence is insufficient to support the judgment that Akers had misapplied money as shown by the judgment." *

It is to be observed that no mention is made in the foregoing specifications of error of the motion for a nonsuit and petitioner's exception to the denial thereof. A further examination of petitioner's brief reveals that petitioner did not even argue in support of all of the assignments of error enumerated in the brief.

It is apparent that the specifications of error above quoted, only some of which were urged and argued by the petitioner in the Circuit Court, relate solely to the general proposition of whether or not the evidence supported the special findings.

This is further borne out by the fact that in the concluding portions of the bill of exceptions offered by the petitioner herein and settled by the trial Court, it is declared that the Maryland Casualty Company excepts to the decision and judgment "upon the ground of the insufficiency of the evidence to justify said decision and judgment, or either of them." (R. p. 324.)

An examination of respondent's reply brief filed with the Circuit Court, a certified copy of which appears in the appendix hereof as "Exhibit B,"

* In the brief filed by Maryland Casualty Company with the Circuit Court there were, as above set forth, eight "specifications of error," while in the bill of exceptions (R. p. 330) there are twenty-two "assignments of error." Obviously at least fourteen "assignments of error" were abandoned by counsel for Maryland Casualty Company in the brief filed, and the failure on the part of the Circuit Court to review these alleged errors so abandoned cannot be complained of for reasons that will be advanced *post*.

reveals that respondent confined its argument in answer to the points raised in petitioner's brief.

It is firmly established under a legion of Federal Court decisions that *petitioner, by confining its brief to certain specifications of error and by disregarding Rule 24 (supra), cannot complain because the Court refused to consider the matters which might otherwise have been the subject of review.*

In

Lohman v. Stockyards Loan Co. (C. C. A. 8), 243 Fed. 517, at p. 518,

the Court said in part:

> "* * * The brief of plaintiff in error disregards the provisions of rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi), which requires the brief to set out the specifications of errors relied upon separately, and this would warrant an affirmance of the judgment. Moline Trust & Savings Bank v. Wyle, 149 Fed. 734, 79 C. C. A. 440). * * *"

In

City of Goldfield, Colo. v. Roger (C. C. A. 8), 249 Fed. 39,

the Court had occasion to say:

> "* * * The brief filed by counsel on behalf of the plaintiff in error in No. 4831 fails to set out the assignments of error upon which they rely, as required by rule 24 (150 Fed. xxxiii, 79 C. C. A. xxxiii) of this court. In City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756, C. C. A. 253, this court announced that the provisions of this rule, particularly in respect to assignments and specifications of error in briefs will be strictly enforced by the court. The opinion in that case was filed January 29, 1894, and has been enforced

> ever since. The judgment against the city must therefore be affirmed. * * *"

The Court is under no obligations to review rulings on the admission or rejection of evidence where the brief does not in compliance with its established rules, set out the evidence admitted or excluded, nor specify the objections to such rulings. See

Wieland v. Pioneer Irr. Co. (C. C. A. 8), 238 Fed. 519, 523.

In

Consolidated Interstate-Callahan M. Co. v. Witkouski (C. C. A. 9), 249 Fed. 833, 840,

the decision reads in part:

> "* * * There were two exceptions, however, reserved to the instructions: * * * Neither of these objections was pressed in the briefs of counsel, and for that reason we might well disregard them. * * *"

The opinion of the Court in

Lee Tung v. United States (C. C. A. 9), 7 Fed. (2nd) 111, at p. 112,

in part states:

> "* * * On the argument it was suggested that the court erred in refusing to instruct the jury as to the effect to be given to evidence of good character; but *counsel did not deem the question of sufficient importance to discuss it in his brief, and we do not consider it of sufficient moment to depart from the general rule that such assignments will not be considered.* Clark v. United States (C. C. A.), 265 Fed. 104, 107. * * *" (Italics ours.)

See also the following decisions to the same effect:

Texas & P. R. Co. v. Reeder (C. C. A. 5), 76 Fed. 550;

Repauno Chemical Co. v. Victor Hardware Co. (C. C. A. 8), 101 Fed. 948;

Chicago J. W. R. Co. v. Egan (C. C. A. 8), 159 Fed. 41;

Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co. (C. C. A. 8), 154 Fed. 546;

Lincoln v. Sun Vapor Street Light Co. (C. C. A. 8), 59 Fed. 756;

Treton v. Pennsylvania Co. (C. C. A. 6), 185 Fed. 84;

Western Union Telegraph Co. v. Winland (C. C. A. 8), 182 Fed. 493;

Mann v. Dempster (C. C. A. 2), 181 Fed. 77;

Kercheval v. United States (C. C. A. 8), 12 Fed. (2d) 904 at p. 906;

Southeastern Express Co. v. Miller, 264 U. S. 541, 68 L. ed. 840;

Ewing v. Howard, 7 Wall. 499, 19 L. ed. 293;

Harris v. Newson (C. C. A. 8), 23 Fed. (2d) 652;

Blaine et al. v. U. S. (C. C. A. 5), 29 Fed. (2d) 651;

Wabash Railway Co. v. Lindley, 29 Fed. (2d) 829;

and

28 *U. S. C. A.* 988, *Note 30.*

The foregoing decisions indicate that the action of the Circuit Court, in considering only those specifications which petitioner thought of sufficient moment to point out and discuss in its brief filed with the Court, was in accordance with a rule of law firmly embedded in federal practice. That the rule has merit is clear when it is considered that a different rule

might well have the effect of shifting to the Courts a burden that rests rightfully upon counsel for the litigants.

Counsel for petitioner classify five groups of assignments of error which it is claimed were based upon rulings of the Court in the progress of the trial of the cause "excepted to at the time" and duly presented by the bill of exceptions. (See petition, p. 4 and 11 and 12.)

Let us now consider each of these classifications:

(a) It is claimed that the Circuit Court should have passed upon the propriety of the ruling by the District Court in denying the motion for nonsuit. Respondent admits that this ruling was excepted to (R. p. 242), but an examination of the brief filed by the Maryland Casualty Company with the Circuit Court fails to disclose therein either among the specifications of error or among the "points" argued any claim that the Court erred in denying the motion for nonsuit.

In view of the requirements of Rule 24, above referred to, the Maryland Casualty Company is not in a position to complain of the failure on the part of the Circuit Court to pass upon a matter not properly or at all presented in the brief.

(b) It is next claimed that the Circuit Court should have ruled upon the action of the District Court in disallowing defendant's exceptions to the report of the referee. (Petition, p. 4.) It is admitted that *assignments* Nos. 11, 12 and 14 (R. p. 334-335) bear upon this matter, but the Maryland Casualty

Company cannot complain that the Circuit Court did not rule thereon, for three reasons:

1st. These assignments were not included among the specifications of error, as required by Rule 24 of the Circuit Court.

2nd. None of the alleged errors was "separately" or "particularly" asserted or urged among the "points" enumerated in the brief.

3rd. Finally, for the conclusive reason, that the *order of the District Court* in disallowing and overruling the exceptions and objections to the referee's report *was not excepted* to as required by Section 700 of the Revised Statutes.

The record discloses in this regard that the referee filed his report on June 16, 1927. (R. p. 319.) Thereafter on July 8, 1927, Maryland Casualty Company filed its objections and exceptions *to the referee's report*. (R. p. 323.) The record then shows that "thereafter the said exceptions and objections came on duly to be heard by the Court, and the Court after the hearing thereof duly gave and made in the cause its order disallowing and overruling said exceptions and objections." (R. p. 324.)

Neither at this point nor elsewhere in the record is there any evidence of any exception taken by Maryland Casualty Company *to the order of the District Court* disallowing and overruling the exceptions and objections which were filed to the referee's report. There is nothing in the record which discloses any exception by the Maryland Casualty Company *to the ruling of the District Court* in disallowing and over-

ruling the exceptions and objections to the referee's report either "at the time" of the ruling or at any time thereafter. In the absence of such exception the Circuit Court could not have considered such an assignment of error, even if it had been included among the specifications of error or argued in the brief of the Maryland Casualty Company.

(c) It is next claimed that the Circuit Court should have considered the rulings of the District Court on certain evidence offered during the course of the trial by reference to assignments 17, 18, 19 and 20. (R. p. 335 to 339; Petition, p. 4.) The Maryland Casualty Company cannot complain that the Circuit Court did not rule upon these assignments for the following reasons:

1. They were not included by reference or otherwise among the specifications of error, as required by Rule 24 of the Circuit Court, which expressly declares that "when the error alleged is to the admission or to the rejection of evidence, the specifications shall quote the full substance of the evidence admitted or rejected."

2. None of the alleged errors was "separately" or "particularly" asserted or urged among the "points" enumerated in the brief.

(d) It is next claimed that the Circuit Court should have considered the ruling of the District Court in including interest in the judgment. (R. p. 335; Petition, pp. 4, 13.)

No complaint can be made of the failure on the part of the Circuit Court to rule upon this assignment for similar reasons to those above advanced, namely:

It was not included by reference or otherwise among the specifications of error, as required by Rule 24, nor was it "separately" or "particularly" asserted or urged among the "points" enumerated in the brief.

(e) It is next claimed that the Circuit Court should have considered the ruling of the District Court in referring the cause to a master and referee, for the purpose of taking further testimony. (R. p. 242, Assignment No. 21; R. p. 339; Petition, pp. 4, 13.)

In this regard, as well, the Circuit Court was not required to consider the ruling made by the District Court, for the reason that the assignment of error was not included by reference or otherwise among the specifications of error, nor was it argued "separately" or "particularly" among the "points" enumerated in the brief.

Petitioner, in its brief filed with this Court, quotes a portion of the Circuit Court of Appeals' decision rendered in this cause (Petitioner's Brief, p. 3), and stresses as error the following language used therein:

> "All the assignments of error are based upon the insufficiency of the testimony to support the special findings; but the special findings, as made, were not excepted to, and there was no request for other or different findings.
>
> Section 700 of the Revised Statutes (28 U. S. C. A., Sec. 875) provides that when an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly

presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or appeal; and when the finding is special the review may extend to a determination of the sufficiency of the facts found to support the judgment.

On such a record it is too well settled to admit of further controversy that this court cannot consider the sufficiency of the testimony to support the special findings, but only the sufficiency of the special findings to support the judgment. Lewellyn v. Electric Reduction Co., 275 U. S. 243, 48 S. Ct. 63, 72 L. Ed. * * * The plaintiff in error does not contend that the special findings are insufficient for that purpose, and the contrary is apparent from an inspection of the record. Having reached this conclusion, no useful purpose would be served by setting forth the voluminous findings, either in detail or in substance. 27 Fed. (2d) 321, 322. (R. pp. 354-355.)"

The language used by petitioner in urging error is as follows:

"* * * Your petitioner respectfully submits, however, that all the assignments of error were not *based upon the insufficiency of the testimony to support the special findings*, but that certain of the assignments of error were *based upon rulings of the Court in the progress of the trial of the cause, excepted to at the time, and duly presented by a bill of exceptions.* (Pet. p. 4) * * *"

In addition to the reply already made to the foregoing statement, the further complete answer to petitioner's attack is obvious. The Circuit Court in stating that "all assignments of error are based upon the insufficiency of the testimony to support the special findings," unquestionably referred to the "specifications of error," as

required to be and as actually set forth and urged in the petitioner's brief, which brief was before the Court at the time of the oral argument and also at the time of the decision.

In other words, the Court had the right to assume, in the light of its Rule 24, that the Maryland Casualty Company did not propose to urge any errors among its assignments of error, as contained in the record, other than those which may have been included among the specifications of error as set forth in the brief.

Moreover, the Circuit Court was assured by counsel for the petitioner on the oral argument, that plaintiff in error did not contend that the special findings were insufficient to support the judgment, but that the only question which petitioner desired the Court to consider was the contention that the evidence did not support the special findings.

This position on the part of the petitioner herein, when the cause was argued before the Circuit Court, is reflected in the opinion of the Court itself where the Court said, "the plaintiff in error does not contend that the special findings are insufficient for that purpose, and the contrary is apparent from an inspection of the records."

It is respectfully submitted, therefore, that petitioner is hardly in a position to claim error now, after having disregarded the provisions of Rule 24 and after having taken the position in the Circuit Court of Appeals on oral argument that it was relying upon the alleged insufficiency of the evidence to support the special findings.

C.

MARYLAND CASUALTY COMPANY FAILED TO EXCEPT TO THE SPECIAL FINDINGS AND LIKEWISE FAILED TO REQUEST OTHER OR DIFFERENT FINDINGS AND IT FOLLOWS THAT THE RECORD PRESENTED TO THE CIRCUIT COURT PREVENTED A CONSIDERATION OF WHETHER OR NOT THE EVIDENCE SUPPORTED THE SPECIAL FINDINGS.

The pertinent portion of the Circuit Court's decision appears in this brief, supra, p. 13, and will therefore not be quoted.

The opinion cites and relies upon Section 700 of the Revised Statutes (28 U. S. C. A. 875), which section prescribes the limitation upon the Circuit Court in reviewing a decision rendered by a District Court to "the determination of the sufficiency of the facts found to support the judgment."

As heretofore stated, the District Court made special findings in this cause at the conclusion of the case. (R. pp. 54-72.) The petitioner did not note an exception to those findings, nor did it request other or different findings. It is well settled, as pointed out by the Circuit Court in its decision, that under such a record the Court could only consider the sufficiency of the findings to support the judgment. Petitioner does not contend that the findings do not support the judgment, and so the case disposes of itself.

> *Lewellyn v. Electric Reduction Co.*, 275 U. S. 243, 72 L. Ed. 262,

the case cited by the Circuit Court as authority for its position, amply serves that purpose. This Court there said, in part:

"* * * A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of the facts specially found to support the judgment, and to the rulings excepted to and presented by the bill of exceptions (Rev. Stat., Secs. 649, 700, U. S. C. title 28, Secs. 773, 875; Fleischmann Constr. Co. v. United States, 270 U. S. 349, 70 L. ed. 624, 46 Sup. Ct. Rep. 284); and we are without power to grant a new trial except for error thus presented (Mueller Grain Co. v. American State Bank, No. 61, October Term, 1927, decided October 24, 1927 (275 U. S. 493, post, 117), reversing (C. C. A. 7th) 15 Fed. (2d) 899.) * * *"

In

Fleischmann Constr. Co. v. United States, 270 U. S. 349, 70 L. ed. 624,

(cited in the *Lewellyn* case, supra) this Court said, in part:

"* * * To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. Norris v. Jackson, supra, 129 (9 L. ed. 609); Martinton v. Fairbanks, 112 U. S. 673, 28 L. ed. 863, 5 Sup. Ct. Rep. 321. That is, as was said in Humphreys v. Third Nat. Bank, 21 C. C. A. 538, 43 U. S. App. 698, 75 Fed. 855, '*he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to.* In this way, and in this way only,

is it possible for him to review completely the action of the court below upon the merits.'" (Italics ours.)

It will be noted that in the *Fleischmann* case this Court pointed out that the exclusive method of obtaining a review of a case upon the merits where special findings are made, is to reserve an exception to the special findings. The record indicates that an exception was not reserved and counsel for petitioner frankly concede in their petition filed with this Court, at page 4 thereof:

> *"It is, of course, admitted by your petitioner that there was no request for different findings."* (Italics ours.)

See also

Henning v. Richey, 196 Fed. 779, 116 C. C. A. 45;

Vera Cruz & P. R. Co. v. Waddell, 155 Fed. 409, 83 C. C. A. 673;

Scandinavian-American Bank v. National Bank, 271 Fed. 805.

The decisions cited by petitioner in its brief filed herein at pages 11 and 12 thereof are cases wherein no special findings were made, and for that reason those cases furnish no aid in the determination of this case.

CONCLUSION.

We submit most respectfully that the status of the case before this Court requires a dismissal of the

writ and an affirmance of the judgment heretofore rendered by the Circuit Court.

Dated, San Francisco,
February 20, 1929.

NAT SCHMULOWITZ,
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(Appendix Follows.)